

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE**  
**IN AND FOR SUSSEX COUNTY**

MARIANNE GOULD,	)	
	)	C.A. No. 2004-10-009
Plaintiff,	)	
	)	
vs.	)	
	)	
DANIEL WIEN,	)	
	)	
Defendant.	)	

Submitted: July 6, 2009  
Decided: August 6, 2009

*Norman C. Barnett, Esquire, Attorney for Plaintiff*  
*John F. Brady, Esquire, Attorney for Defendant*

**DECISION ON ADDITIONAL ATTORNEY'S FEES**

**Background**

This is a petition for additional attorneys' fees incurred by the successful Plaintiff in opposing the Defendant's appeals of the judgment entered against him in this Court to both the Superior and Supreme Courts. Plaintiff sued Defendant to recover a \$16,500.00 deposit paid on a residential real estate sales contract, which, the Court found, failed to close because of a financing contingency. After a full trial on the merits, this Court found that the Defendant wrongfully kept the deposit as forfeited, and entered judgment against Defendant for the amount of the deposit, plus attorney's fees. After submission by the parties on the attorney's fee issue, the Court reduced the requested fee amount of more

than \$11,000.00 to \$7,000.00, largely in consideration of the amount of the judgment and a continuance necessitated by the Plaintiff.

Defendant appealed this matter to the Superior Court prior to this Court's fee decision. Plaintiff successfully moved to dismiss that appeal since the judgment was not final until the fee award. Defendant again appealed to the Superior Court after the final judgment; the Superior Court affirmed the judgment. Defendant then appealed the matter to the Delaware Supreme Court, which again affirmed the decisions of the lower courts. Plaintiff then petitioned this Court for the reasonable attorneys' fees incurred in opposing the appeals.

### **Discussion**

Counsel for Plaintiff's affidavit in support of his petition for additional fees documents 46.28 hours of time spent opposing the Defendant's appeals to the higher courts, and states that his hourly rate throughout this period was \$250.00. It also documents additional transcript costs of \$325.00. Plaintiff thus seeks a total of \$11,895.00 in additional fees and costs.

Defendant's six page response to the fee motion contains twelve enumerated paragraphs. The first nearly four pages and seven paragraphs thereof contain re-arguments and re-characterizations of, and outright disagreements with, the factual findings made by this Court and now affirmed by two higher Courts. The Court finds these "answers" to the fee

motion both irrelevant and inappropriate, and bordering on disrespect to each of the Courts that have ruled in this matter.

Defendant in these paragraphs also attempts to oppose the fee request by referring to counsel for Plaintiff's conduct prior to suit as "professionally questionable," and claiming that he "misrepresented" an issue at trial. These specious allegations lack any showing of merit, and in any event refer to a timeframe encompassed by the last fee petition, and were not previously raised in response to that petition.

The *Delaware Lawyers Code of Professional Responsibility* DR-1.5 enumerates the factors to be considered in determining the reasonableness of a claim for attorney's fees:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fees customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

These factors are applied by Delaware Courts in awarding attorney's fees.<sup>1</sup> In addition, the Court also may consider the ability of the losing party to pay attorney's fees.<sup>2</sup>

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<sup>1</sup> *Husband S. v. Wife S.*, 294 A.2d 89, 93 (Del. 1972); *General Motors Corp. v. Cox*, 304 A.2d 57 (Del. 1973).

<sup>2</sup> *General Motors Corp. v. Cox*, 304 A.2d 57 (Del. 1973).

The Court has already considered these factors in its previous award of fees through trial in this matter, and incorporates herein the applicable reasoning and findings contained therein. Although Defendant now objects to counsel for Plaintiff's current fee rate, he did not contest that same fee rate in the prior petition. The Court has already found that rate reasonable, customary and usual in this jurisdiction for similar services.

Defendant also contends that the 46.28 hours spent by Plaintiff's counsel in opposing the appeals are excessive, citing his own counsel's time spent as 14 hours. Neither Defendant nor his counsel submitted an affidavit attesting to the claimed 14 hours. It should be noted that counsel for Plaintiff's affidavit includes approximately 5 hours of time spent successfully moving to dismiss Defendant's premature appeal. Although this Court has not been provided copies of the appellate briefs, Defendant has not demonstrated any reason for the Court to question the accuracy or reasonableness of counsel for Plaintiff's reported time spent in successfully briefing and defending two appeals to the Superior Court and one to the Supreme Court; Plaintiff has met her burden on this issue.

Although the Court previously found, from the evidence available at trial, the Defendant able to pay the fee sought at that time, Defendant now claims that he has been unemployed since 2003, that his primary income is from social security, that is he going through a Family Court marital asset dissolution, and will have to sell investments to pay a fee award. However, these allegations are not supported by affidavit. Further, to the extent that

any of these conditions existed in August, 2007 (such as Defendant's unemployment status), they were not previously raised. In fact, Defendant offered no evidence or argument on his ability to pay the first fee request. In any event, there is insufficient evidence before the Court to find the requested fee should be reduced due to the Defendant's inability to pay.

Finally, Defendant essentially argues that, if the request is granted, the total fee award would be inappropriate in light of the amount of the judgment. The Court entered judgment after trial in the amount of \$16,500.00. It reduced the original fee request from more than \$11,000.00 to \$7,000.00, in consideration, in part, of the ratio of the judgment amount to the fee request. The Court does not find the same rationale applicable to the appeal fees now sought. As is his right, Defendant elected to appeal this judgment to both the Superior and Supreme Courts. He knew the appeals would require Plaintiff to incur further fees on appeal or lose her judgment by default. He knowingly incurred the risk of paying more Plaintiff's attorneys fees if his appeals were unsuccessful. To not award Plaintiff her appellate attorneys' fees would result in an effective loss of the majority of her damages judgment, if she has to pay her appellate fees out of her own pocket.

### **CONCLUSION**

In addition to the judgment entered in its June 27, 2007 decision, and the previously awarded attorney's fees and costs of \$7,670.13, the Court awards further reasonable attorney's fees incurred through the

appellate process to Plaintiff Marianne Gould, and against Defendant Daniel Wien, in the amount of \$11,570.00, plus additional costs in the amount of \$325.00, plus post-judgment interest thereon from the date of this decision at the legal rate.

**IT IS SO ORDERED** this \_\_\_\_\_ day of August, 2009.

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Kenneth S. Clark, Jr.  
Judge